building is erected". The point made by Whyatt C.J. in *Lim Beng Teck's case* (1) was that if the legislature, having taken the unusual course of establishing a legal fiction for the purpose of facilitating a prosecution, had intended that a prosecution could also be brought on a factual basis, sub-section (12) would have contained some qualifying words, limiting the operation of the legal fiction to those cases where no prosecution was or could be brought on a factual basis. With that reasoning of his Lordship I respectfully agree. The other point made by his Lordship was that if, in the absence of such qualifying words, the construction contended for the respondent was correct, it would follow that two prosecutions could be brought under section 144 and two punishments could be imposed on two different persons, notwithstanding that only one offence had been committed by one person. To my mind, that is not a serious objection, as there are offences known to the law for which two separate persons can be charged, as, for example, in the case of some offences under the Road Traffic Ordinance, 1958.

In my judgment, the reading of section 144 as a whole makes it clear that the legislature intended to saddle the owner of the land with the sole responsibility of seeing that section 144 was complied with. I agree that it is extremely unfair to saddle owners of land with this responsibility, especially when it is a common occurrence in most of the big Municipal areas and some of the Town Board areas for people to put up unauthorized buildings on lands not belonging to them and to squat on them, but it is a situation which only the legislature can remedy. A simple remedy would be to amend sub-section (12) by inserting in the appropriate place words such as "in the absence of proof to the contrary", or to delete the sub-section altogether. The courts can do no more than to construe any law enacted by the legislature in its wisdom, and I can construe sub-section (12) in no other way than to hold that no person other than the owner of a land can be charged with and convicted of any offence connected with building operations thereon under section 144 of the Ordinance. On that ground I am compelled to allow this appeal and to set aside the conviction and the fine imposed on the appellant and the order made against him to demolish the extension.

Appeal allowed.

Solicitors: *Ranjit, Thomas & Kula; Shook Lin & Bok.*

MAIDIN PITCHAY & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (MacIntyre J.) October 12, 1967]

[Ipoh — Criminal Appeal No. 49 of 1967]

Road Traffic — Using car as public service vehicle without valid licence — Using car without there being in force a policy of insurance in respect of third party risk — Road Traffic Ordinance, 1958, ss. 92(1) and 74(1).

Evidence — Police observations over motor vehicle suspected of being used contrary to s. 92(1) of the Road Traffic Ordinance — Admissibility of — Evidence Ordinance, 1950, s. 15 — Presumption — Road Traffic Ordinance, s. 144.

The appellants were convicted by a magistrate at Parit Buntar, Perak, of offences under sections 92(1) and 74(1) of the Road Traffic Ordinance, 1958. The first appellant was charged as the person who used a motor vehicle and the second appellant, who was the registered owner of the said vehicle, for permitting its use as a public service vehicle without a valid licence and using the said vehicle without there being in force a policy of insurance in respect of third party risk in contravention of the aforesaid provisions of law. At the trial, two police constables testified that they had kept watch over the said vehicle almost daily from June 26 to July 10, 1966 and during that period, had seen and recorded particulars of their observations. The first appellant was observed by police to have been using the same car in all 60 trips for conveyance of passengers of different racial origins. On July 22, 1966 the date of the commission of the alleged offence, the first appellant was stopped by the police and found to be carrying 5 passengers consisting of two men, a Chinese and a Malay, and three women, two of whom were Malays and one Indian. The defence was called. The first appellant denied carrying passengers concerned on July 22, for hire or reward but averred that he has intended to give them a free lift. The second appellant's defence was a general denial of the charge. He denied giving any authority to the first appellant to convey passengers for hire or reward.

Held: in view of the statutory presumption under section 144, the question of whether or not on the material date the conveyance of passengers was for hire or reward does not arise in a prosecution under section 92(1) of the Road Traffic Ordinance. It was to be presumed. It was for the defence to show that the the passengers were not carried for hire or reward. The obvious way, besides a bare denial, of proving a negative proposition such as this, was for the accused to call evidence to show that the incident in respect of which he is charged was an isolated one and that all the passengers happened to be in the car through circumstances which are fortuitous and not intentional.

Ali bin Hassan v. *Public Prosecutor* (1) dissented from.

Observations on the evidence of watch kept by the police.

Cases referred to:—

(1) *Ali bin Hassan* v. *Public Prosecutor* [1967] 2 M.L.J. 76.

(2) *Abdul Hamid* v. *Public Prosecutor* [1962] M.L.J. 44, applied.

(3) *Darus* v. *Public Prosecutor* [1964] M.L.J. 146, applied.

(4) *Makin* v. *Attorney-General of New South Wales* [1894] A.C. 57.

MAGISTRATE'S CRIMINAL APPEAL.

Mahinder Singh for the appellants.

Idris bin Yusoff (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

MacIntyre J.: The appellants herein, namely, M.A.M. Maidin Pitchay (hereinafter referred to as the 1st appellant) and Sow Joon Soon (hereinafter referred to as the 2nd appellant) were convicted by a magistrate at Parit Buntar, Perak, in summons cases Nos. 1624 and 1625, respectively, of offences under sections 92(1) and 74(1) of the Road Traffic Ordinance. The 1st appellant was charged as the person who used a motor vehicle bearing registration number AC 9865 and the 2nd appellant, who is the registered owner of the said vehicle, for permitting its use in contravention of the aforesaid provisions of law.

The date of the commission of the alleged offences was the 22nd of July 1966. On that day when the car was being driven past the Semanggol police station by the 1st appellant, it was stopped by corporal Abdul Mutalib (P.W.2) and found to be carrying 5 passengers consisting of two men, a Chinese and a Malay, and three women, two of whom were Malays and one Indian.

At the trial, two police constables, P.W.3 and P.W.6 testified that acting on the instructions of a superior officer, they had kept watch over the said vehicle almost daily from the 26th of June to the 10th of July 1966 and during that period had seen and recorded particulars of their observations. The car was seen plying between Simpang Empat, Semanggol, and some place or places along Ipoh Road, making in all 60 trips to and fro and had conveyed 266 passengers, of whom 185 were males and 81 were females; and by racial classifications 75 were Malays, 67 Chinese and 124 Indians. The prosecution elected not to call any of the passengers found in the car but offered only three of them to be called as witnesses for the defence as the whereabouts of the other two could not be traced in time to serve the subpoenae. The prosecution then closed their case, relying on the statutory presumption provided by section 144 of the Road Traffic Ordinance.

The defence was called. The 1st appellant denied carrying the passengers concerned on the 22nd of July for hire or reward but averred that he had intended to give them a free lift to Kampong Dew where he was then proceeding on his master's errand, namely, to take delivery of some tortoises. He had earlier deposed that the 2nd appellant was a dealer in wild animals and that in the course of his employment he had to convey not only members of his family but also trappers of wild animals. Later, he said in cross-examination that the trappers he carried were of various races. This was said, no doubt, to explain the fact that he was seen on previous occasions conveying passengers of various races. In regard to the passengers carried on the 22nd of July, he admitted picking them up on the street as he passed them by. The first passenger to get in was the Indian woman. He was then stopped by the male Chinese and he agreed to give him a lift because he was known to him. Then came the three Malays who were standing nearby and he agreed to give them also a lift because he knew one of them, a school teacher. The 1st appellant elected to call only one of the passengers as his witness. He was the male Chinese (D.W.2). On one very important point his evidence was in conflict with that of the 1st appellant's. He deposed that when he got into the car, the three Malays were already there.

The 2nd appellant's defence was a general denial of the charge. He denied giving any authority to the 1st appellant to convey passengers for hire or reward. His duty, besides conveying his children to school and back, was to convey wild animals, hunters and trappers in connection with his business. On the average, he claimed, his car was used about three times a day to convey wild animals.

At the close of the case for the defence the learned magistrate, holding that the defence had failed to rebut the presumption under section 144 of the Road Traffic Ordinance, convicted and sentenced both the appellants of the offences charged.

Before considering the grounds of appeal, I would like to make some observations in regard to the evidence of the watch kept by the police. No serious attempt was made by the defence to discredit that evidence. But, on the other hand, the defence had sought to explain away that evidence by saying that the car was used frequently for conveying wild animals and trappers of various races. If that was the main purpose for which the car was used, it is indeed significant, that during the 14 days when the car was kept under observation, not a single wild animal was seen being conveyed in the car, although according to the 2nd appellant, the frequency of such conveyance was three times a day. As for the alleged conveyance of trappers, I have only one observation to make. It is true that in many fields of human enterprise, the female of the species has entered into fierce competition with the male; but I am yet to be convinced that the competition had been carried in any marked degree into the field of trapping wild animals. It is therefore significant to also note that 81 of the passengers carried were females. Besides, none of the so-called trappers employed by or working for the 2nd appellant were called to give evidence.

It was urged on behalf of appellants that their convictions were against the weight of evidence because (1) no identification parade was held for the purpose of identifying the 1st appellant as the person seen by P.W.3 and P.W.6 conveying passengers; (2) that there was a reasonable doubt that the car seen by P.W.3 and P.W.6 was the same car in respect of which the charges were framed because in the course of their evidence these witnesses were unable to state the make or the colour of the car; and (3) that the evidence of D.W.2, considered in conjunction with the evidence of the 1st appellant, was more than sufficient to rebut the presumption under section 144 of the Road Traffic Ordinance. It was also submitted that the convictions were bad in law because (1) the learned magistrate had failed to draw an adverse inference under section 114 of the Evidence Ordinance on account of the failure of the prosecution to call as their witness or offer to the defence two of the passengers conveyed in the car on the 22nd of July; and (2) the convictions were based partly in the case of the 1st appellant and mainly in the case of the 2nd appellant on the evidence of the observations made by the police, since such evidence has now been ruled as prejudicial and inadmissible by the High Court in *Ali bin Hassan* v. *Public Prosecutor*.[1]

The ruling of Ali J. in this case is in conflict with previous observations by the High Court. In *Abdul Hamid* v. *Public Prosecutor* [2] Adams J. said: "In *Guan Kim Luu's* case, the police had kept watch on the vehicles over a period of time and had gathered evidence which was admissible under section 15 of the Evidence Ordinance which showed quite conclusively that the defendant had been plying for hire and I think it very desirable that evidence of this nature should be produced in all cases of this nature." In *Darus* v. *Public Prosecutor* [3] Ong Hock Thye J. (as he then was) commenting on the watch kept by the police on a vehicle suspected of being used for the conveyance of passengers for hire, said: "What took place during the previous 14 days was evidence, for the purpose of section 15 of the Evidence Ordinance, to prove that the meeting was not accidental and that it was the appellant's regular practice to pick up passengers."

Now section 15 of the Evidence Ordinance reads as follows:—

"When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."

Since this section can only be invoked if there is a question as to whether an act was accidental or intentional, Ali J. observed as follows:—

"It now becomes necessary to enquire whether in a prosecution for an offence under section 92(1) of the Road Traffic Ordinance there can possibly arise the question whether the act alleged to constitute the offence was accidental or intentional or done with a particular knowledge or intention. What is prohibited in this section is the act of conveying passengers in the car for hire or reward without a valid licence. The simple issues raised in a charge for such an offence are (1) whether or not on the material date the conveyance of passengers was for hire or reward; and (2) if it was, whether such conveyance was authorised by a valid licence."

With respect I would say, that in view of the statutory presumption under section 144, the question of whether or not on the material date the conveyance of passengers was for hire or reward does not arise in a prosecution under section 92(1) of the Road Traffic Ordinance. It is to be presumed. It is for the defence to show that the passengers were not carried for hire or reward. The obvious way, besides a bare denial, of proving a negative proposition such as this, is for the accused to call evidence to show that the incident in respect of which he is charged was an isolated one and that all the passengers happened to be in the car through circumstances which are fortuitous and not intentional. It would appear that section 15 of the Evidence Ordinance was designed to enable the prosecution to offer evidence in advance to rebut a defence which would otherwise be open to the accused; and that such evidence is admissible even though it may tend to show the commission of other crimes. The authority for this proposition is to be found in the very judgment of the Privy Council in *Makin* v. *Attorney-General of New South Wales* [4] relied on by Ali J. to exclude such evidence. In the judgment at page 65, Lord Herchell, after saying: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment" went on to say: "On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes, does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

I must therefore, with respect, disagree with the view expressed by Ali J. and adopt the view expressed by Adams J. and Ong Hock Thye J. (as he then was) to the effect that the evidence of police observations of the car made prior to the date of the offence covered by the charge is admissible in evidence under section 15 of the Evidence Ordinance.

I find little or no substance in the grounds urged in support of the contention that the convictions are against the weight of evidence. An identification parade is held when there is some doubt as to the identity of the person who is

alleged to have committed the offence with which he is charged. In this case, the 1st appellant was detained while in the act of conveying the passengers and there can be no question of mistaken identity. Further, P.W.3 and P.W.6 had testified that it was the 1st appellant whom they had kept under surveillance for 14 days. In the circumstances, their identification of the 1st appellant at an identification parade would have been redundant. The inability of P.W.3 or P.W.6 to say what the make or colour of the motor vehicle AC 9865 was may be due to the fact that they were at the same time keeping watch over five motor vehicles, but there can be no doubt as to the identity of the car driven by the 1st appellant as P.W.3 had noted down the registration number. As for the weight to be attached to the evidence of D.W.2, there was a material discrepancy between his evidence and that of the 1st appellant to which I have already referred. Finally, I am unable to agree with the submission of counsel that the learned magistrate had erred in law in not drawing an adverse inference under section 114 of the Evidence Ordinance on account of the failure of the prosecution to call or to offer to the defence two of the passengers as witnesses. This is not a case of the prosecution refusing to offer the witnesses to the defence but one of inability to produce them on the day of the trial. The reason for their absence was given in court and defence counsel could have, if he thought their evidence was material, applied for a postponement of the case and asked for the production of the witnesses. Besides, even if the two witnesses were available but not offered to the defence, the only inference that could be drawn is that they were not carried for hire or reward. There were five passengers in all. It would suffice for a conviction under section 92(1) if any one of them was carried for hire or reward.

Taking the evidence as a whole, I am not disposed to disagree with the finding of the learned magistrate. I find no extenuating circumstances to set aside the order of confiscation of the car. The appeals are dismissed.

Appeals dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones.*

YEOH ENG HOCK v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim J.) October 16, 1967]

[Penang — Criminal Revision No. 6 of 1967]

Criminal Procedure — Plea of guilty — Refusal to withdraw plea of guilty — Discretion to allow or refuse a plea to be retracted must be exercised judicially.

The court has power to allow or refuse a plea to be retracted but that discretion must be exercised judicially. In a case where a plea of guilty has been made but before facts have been given, it is the usual practice to allow such plea to be withdrawn. That is an elementary rule because all that an accused person need to do is to refuse to admit to the facts or to enter a qualified plea by pleading other facts which would then be treated as amounting to claiming trial to the charge.

CRIMINAL REVISION.

Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Ong Hock Sim J.: I have called for this case in revision because upon my attention being drawn to it, I considered that the action of the learned president in refusing to allow the accused to withdraw his plea of guilty was wrong.

In this case the accused was charged:—

"That you on the 10th day of August, 1967 at about 8.30 p.m. at the Polo Ground Western Road, in the District of Georgetown, in the State of Penang, did an act, to wit, by catching the neck and putting a sharp object on the abdomen of Abdul Aziz bin Mohd. Zain, which amounted to an attempt to rob the said Abdul Aziz bin Mohd. Zain, and that you have thereby committed an offence punishable under section 393 of the Penal Code."

The record shows that on the 25th of August, 1967 the charge was read over and explained to the accused, who "pleads guilty to the charge — says he understands nature and consequences of his plea." The case was then adjourned to 8th September, 1967 for facts and sentence. On that day, the record further shows:—

"Accused says he wishes to withdraw plea of guilty".

To that the president recorded:—

"Withdrawal of plea of guilty not allowed — Accused had informed me on 25.8.67 through court interpreter that if his plea was accepted after hearing the facts in this case this court will deal with him according to law."

The president then proceeded to record the facts given by the prosecuting officer which briefly showed that the accused caught the complainant by the neck and at the same time thrust a sharp object against his stomach. The complainant apparently resisted him and there was a short struggle and the accused then ran away. The learned president went on to record:—

"Accused admits facts" "but I did not attempt to rob complainant. I went there just to peep at couples making love. Malay stared at me. I stared at him back. I had drinks that night."

That apparently is his defence. In the struggle that ensued he lost his identity card which fell on the ground and was recovered by the complainant. The accused surrendered himself to the police when he went to claim his identity card after reading newspaper report of the incident.

The authorities are clear that the court has power to allow or refuse a plea to be retracted but that discretion must be exercised judicially. In a case where a plea of guilty has been made